



United States Department of Justice

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December 23, 2022

Hon. Mae A. D'Agostino
United States District Court Judge
Northern District of New York
James T. Foley Federal Courthouse
445 Broadway
Albany, New York 12207

Re: Sentencing Hearing re *United States v. Xiaoqing Zheng*
19-CR-156 (MAD)

Dear Judge D'Agostino,

The government respectfully submits this brief letter in response to the defendant's Supplemental Authority in Support of Defendant's Sentencing Memorandum filed on December 14, 2022. Dkt. No. 320. In the defendant's filing, he cites to the Third Circuit's recent decision in *United States v. Banks*, 2022 WL 17333797 (3d Cir. 2022) which, in a case of apparent first impression, held that U.S.S.G. § 2B1.1 does not include intended loss, and only applies to actual loss. *Id.* at *6-*7.

The government Shepardized the *Banks* case just prior to filing this letter and found no other circuit court decisions that cite, let alone follow, *Banks*. Moreover, the government could not identify a single case (district court or appellate court) within the Second Circuit that cites to *Banks* and its holding on loss.

In the Second Circuit, loss is not limited to actual loss. Rather, a district court's loss determination under U.S.S.G. § 2B1.1(b)(1) is to be the greater of "actual loss or intended loss . . ." *United States v. Skys*, 637 F.3d 146, 153 (2d Cir. 2011); *see also, United States v. Lacey*, 699 F.3d 710, 718 (2d Cir. 2012).

Finally, even if the Court was to follow *Banks*' holding, the actual loss to GE, at a minimum, exceeds \$1.5 million for the reasons cited in the government's second sentencing memorandum. *See* Dkt. No. 311.

Thank you.

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Very truly yours,

CARLA B. FREEDMAN
United States Attorney

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